

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORIGINAL SIDE

APPEAL NO.551 OF 1997  
IN  
NOTICE OF MOTION NO.308 OF 1995  
IN  
SUIT NO.5199 OF 1994

Mr.Dominic Francis D'sa, of Bombay  
Indian Inhabitant, residing at Flat  
No.4, 1st Floor, Kolvery, Kalina  
Church Road, Santacruz East, Bombay  
400 098.

Appellant/  
original plaintiff

versus

1.Mr.Allwyn Bruce Cecil D'Sa of  
Bombay, Indian Inhabitant, residing  
at Flat No.104, "Kalpana", 'A' Wing,  
Sherley Rajan Road, Bandra (West),  
Bombay 400 050.

2. Mr.Percy Anthony Honorato D'Sa  
of Bombay, Indian Inhabitant, residing  
at 1-B, Sassoon Docks, Colaba,  
Bombay 400 005.

3. Messrs.Shalom Development Corporation,  
a firm, having its office at Shop No.13,  
Pearl Haven, Chapel Road  
Bandra (West), Bombay 400 050.

4. Mr.Mario Savio Ignatious D'Sa,  
of Bombay, Indian Inhabitant, a partner  
of Defendant No.3 abovenamed residing  
at 139-C, Bazar Road, Bandra  
(West), Bombay 400 050.

5. Mr.Sadanand Tikaram Raut, of  
Bombay, Indian Inhabitant, a partner  
of Defendant No.3 abovenamed, having  
his office at Shop No.13, Pearl Haven  
Chapel Road, Bandra (West), Bombay  
400 050.

6. Mrs.Vijaya Rajkumar Bogle, of  
Bombay, Indian Inhabitant, residing  
at Flat No.101, 1st floor, D'Sa House,  
197 Bhavani Shankar Road, Dadar,  
Bombay 400 028.

Respondents/  
original Defendants.

Mr.Denzil D'Mello for the appellant.

Mr.Navin Parekh i/b.Ms.Hetal Patel for the respondents 3 and 5.

**CORAM : R.M. LODHA &  
S.R. SATHE, JJ.**

**DATED : 9th December 2005**

**ORAL JUDGMENT (Per R.M.Lodha,J.).**

We heard Mr.Denzil D'Mello, the learned counsel for the appellant and Mr.Navin Parekh, the learned counsel for the respondents 3 and 5. Nobody appears for the other respondents.

2. The plaintiff is in appeal aggrieved by the order dated 17.3.1997 passed by the learned motion Judge refusing to appoint Court Receiver in respect of the suit property.

3. The plaintiff filed the Suit for specific performance of the Family Arrangement (Exhibit B) and for direction to defendants 2 to 6 to hand over possession of the flat on the first floor facing the front admeasuring 550 sq.ft., details of which were set out in Exhibit B-1 to the plaint. The plaintiff also made the alternative prayer for damages in the sum of Rs.50 lacs.

4. The defendant no.1 and the defendant no.2 are the brothers of the plaintiff. The defendant no.4 is the son of defendant no.2. The defendant no.3 is a development firm of which defendant no.5 is the partner. The defendant no.6 is in possession of the flat on the first floor of the new building. The plaintiff, the defendant no.1 and the defendant no.2 are co-owners of final plot no.561 of T.P.C. IV at Lower Parel Division admeasuring 322.30 sq.yds. situate at Bhavani Shankar Road, Dadar. There was a structure existing thereon. It is the plaintiff's case that by the Family Arrangement dated 13th October, 1987, it was agreed between him and his brothers that the suit property be developed by demolishing the existing structure and construction of a new building thereon. As per the terms of the Family Arrangement it was the obligation of defendant no.2 to develop the property. The development of the property was to be shared by the plaintiff and defendants 1 and 2 in the manner set out in the Family Arrangement. The plaintiff as well as defendants 1 and 2 agreed that each of one of them shall be entitled to one flat admeasuring 550 sq.ft. in the new building and that none of them will be liable to pay anything towards the cost of the said flat. The defendant no.2 to whom the responsibility was entrusted to develop the property was entitled to dispose of the remaining flats and the shop on the ground floor. The proceeds received from

the flats were to go solely to defendant no.2, while in respect of the sale proceeds of the shop, the plaintiff and the defendant no.1 were to get 25% each, while defendant no.2 was entitled to 50% of the sale proceeds. The defendant no.2 entrusted the work of development to the defendant no.3 and it is the plaintiff's case that the defendant no.3 developed the property by constructing two shops on the ground floor and two flats each on the first floor and the second floor. After the property was developed, despite plaintiff's demand, one flat to which he was entitled under the Family Arrangement, was not given and that resulted in litigation between the parties. Initially, the plaintiff filed the Suit for injunction against the defendants 2 and 3 from selling or disposing or transferring or creating any third party rights in the flats and in the shops in the City Civil Court at Mumbai. The plaintiff made the prayer for interim relief in that Suit by taking out notice of motion in which the defendant no.2 is said to have made the statement that he would not create any third party right or part with possession of the flat admeasuring 550 sq.ft. on the first floor, front side of the new building. It also appears that thereafter the defendant no.2 filed reply affidavit in opposition to the notice of motion before the City Civil Court and contended that the Family Arrangement dated 13th October 1987 was not

meant to be acted upon. This led the plaintiff to file the present Suit before this Court seeking declaration that the Family Arrangement dated 13th October 1987 was binding between the plaintiff and the defendants 1 and 2 and for decree against the defendants 2 to 6 to hand over one flat admeasuring 550 sq.ft. to the plaintiff as per the Family Arrangement. In the Suit, the plaintiff also took out the notice of motion praying therein that Court Receiver be appointed in respect of the suit property and the defendants 2 to 6 be restrained from alienating, transferring or disposing the suit flats and the shops.

5. The learned Single Judge by the impugned order dated 17.3.1996 did not find any justifiable ground to appoint the Court Receiver. He granted an order of temporary injunction restraining the defendants from creating any third party rights in respect of the suit flats during the pendency of the Suit.

6. We find from the proceedings that the Division Bench on 14th July 1997, during the pendency of the appeal appointed the Court Receiver in respect of the flat mentioned in the order and directed the Receiver to take only formal possession of the suit flat and appoint the respondent no.6 as an agent thereof without security and royalty. In so far as the ground-floor shop are

concerned, the Court Receiver was directed to take physical possession with direction to call for the bids for agency and appoint the highest bidder as an agent.

7. Pursuant to the order dated 14th July 1997 it is an admitted position that the Court Receiver took formal possession of the suit flat and physical possession of the shop on the ground floor.

8. The appeal is contested by the defendants 3 and 5 only. Mr.Navin Parekh, the learned counsel for the defendants 3 and 5 submitted that the property was developed by them by spending huge amount and that the expenses in this regard are yet to be recovered from the defendant no.4 or for that matter from defendant no.2. Mr.Parekh submitted that the said defendants are only aggrieved with regard to the appointment of Court Receiver in respect of the shop. He would submit that the only entitlement of the plaintiff, even if the Family Arrangement is accepted as it is, is to receive 25% of sale proceeds received from the sale of the shop and, therefore, there is no justification for appointment of Court Receiver in respect of the shop.

9. In so far as the defendants 3 and 5 are concerned, they are stranger to the Family Arrangement. As per the Family Arrangement dated 13th October, 1987, the three

brothers (plaintiff, defendant no.1 and defendant no.2) agreed that the property co-owned by them shall be developed by demolishing the existing building and construction of a new building thereon. Upon such development, each of three brothers was entitled to a flat admeasuring 550 sq.ft. in the new building. None of them was required to pay towards the cost of the said flats. The defendant no.2 was entrusted the responsibility of carrying out the development work and it was agreed between the brothers that defendant no.2 was entitled to dispose of the flats exceeding three and the shop to any person as he may deem fit. The defendant no.2 was entitled to the entire sale proceeds of the flat or flats exceeding three. However, from the sale proceeds received from the sale of the shop, the plaintiff and defendant no.1 were entitled to 25%, while defendant no.2 was entitled to 50%. It appears that after development of the property by defendant no.2 (or defendant no.4, who is son of defendant no.2) through defendants 3 and 5, one flat to which the plaintiff was entitled under the Family Arrangement was not kept for him and the said flat was sold to third party. Hence the litigation. Now since the defendant no.2 is denying that the Family Arrangement dated 13th October 1987 is not to be acted upon, we are of the considered view that the case for the appointment of Court Receiver in respect of the flat as well as shop is clearly made out.

Prima facie it can be said that the defendant no.2 is not ready and willing to discharge his obligations under the Family Arrangement dated 13th October 1987. It is, therefore, just and proper that Court Receiver is appointed in respect of the suit flat as well as the shop/s on the ground floor. That is exactly what was ordered by the Division Bench as an interim measure during the pendency of the appeal.

10. The impugned order, therefore, deserves to be modified. Appeal is disposed of in terms of the interim order dated 14th July 1997.

. No costs.

**(R. M. LODHA, J.)**

**(S. R. SATHE, J.)**